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IN THE

Supreme Court of the United States

October Term, 1955.

No. 789.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

WILLIAM KELLY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Pennsylvania Railroad Company, petitioner, prays that a writ of certiorari be issued to review the decree of the United States Court of Appeals for the Third Circuit, as of No. 11,689, in which it held that it had no jurisdiction of petitioner's appeal to that court and accordingly dismissed it.

OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania filed no opinion. The opinion of the Court of Appeals, which is appended hereto, is reported in 228 F. 2d 727, 22 Fed. Rules Serv. 73a.64, *case 2.* The dissenting opinion of the Chief Judge follows that of the two-judge majority.

JURISDICTION.

Petitioner's appeal to the Court of Appeals was dismissed on December 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

After entry of judgment in the District Court on a jury verdict for plaintiff, and after the District Court has denied defendant's timely written motions for judgment under Rule 50(b) of the Federal Rules of Civil Procedure and for a new trial under Rule 59, does not the Court of Appeals have jurisdiction to decide an appeal taken by defendant within thirty days of the denial of its motions, even though the District Court, without hearing argument or in any way modifying its orders denying the two motions, ordered reargument of the new trial motion?

STATUTE AND RULES INVOLVED.

§ 1291 of the Judicial Code, 28 U. S. C. § 1291. Federal Rules of Civil Procedure, 28 U. S. C., Rules 73(a), 50(b), 59, 60(b), and 6(b).

The texts of the Statute and Rules are appended hereto.

STATEMENT OF THE CASE.

The Court of Appeals held that it had no jurisdiction to decide defendant's appeal which was taken from the judgment of the United States District Court for the Eastern District of Pennsylvania in a civil action under the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U. S. C. § 51 *et seq.* (1951).

The 2 to 1 decision of the Court of Appeals (Chief Judge Biggs, dissenting) was based solely upon the following docket entries, the only portion of the record material to this petition (R. 1a-2a):

Nov. 24, 1954	Judgment in favor of plaintiff in $75,760.00 with costs, filed.
Nov. 29, 1954	Defendant's motion for new trial filed.
Nov. 29, 1954	Defendant's motion to set aside verdict and judgment and to enter judgment in its favor filed.
June 6, 1955	Order of court dismissing motion for a new trial and denying motion for judgment n. o. v. filed.
June 8, 1955	Petition of Defendant for Reargument filed.
June 16, 1955	Order granting reargument sur petition for new trial filed.
June 28, 1955	Defendant's notice of appeal filed.

ARGUMENT.

A. Summary of Reasons for the Allowance of the Writ.

1. The decision below is in conflict with the decisions of the Sixth Circuit in *Marten v. Hess*, 176 F. 2d 834 (1949), with the decision of the Second Circuit in *Terrasi v. South Atlantic Lines, Inc.*, 226 F. 2d 823 (1955), and with the Third Circuit's own subsequent decision in *Raughley v. Pennsylvania Railroad Company*, — F. 2d —, 22 Fed. Rules Serv. 73a.64, *case 3* (1956).

2. Nothing contributes so much to confusion, delay and needless expense as an open question of appellate jurisdiction. The question presented here will continue to plague the bench and bar until this Court settles it.

3. The Third Circuit failed to follow the carefully conceived plan of the Federal Rules of Civil Procedure, and has interjected into federal procedure the confusing doctrines of appealability which developed in the case law prior to 1946 and which the drafters of the 1946 and 1948 amendments to the Federal Rules of Civil Procedure sought deliberately to eliminate.

B. Amplification of Reasons for the Allowance of the Writ.

After a verdict and judgment for plaintiff in this jury case, the District Court (Eastern District of Pennsylvania) heard defendant's motions for judgment and for a new trial. More than six months after those motions were filed the District Court denied them (R. 2a). Ten days later that court ordered a reargument of the new trial motion (R. 2a). No time or place was fixed for such a reargument, and it was not held. Nothing was done to affect the judgment, then about seven months old. The orders denying defendant's motions for judgment under Rule 50(b) and for a new trial under Rule 59 remained unchanged on the docket.

Rule 73(a) requires a party to take its appeal within thirty days of the denial of motions for judgment and for a new trial (Appendix hereto p. 19), and defendant did so. The Court of Appeals for the Third Circuit held that the District Court's ordering a reargument of the new trial motion extended the appeal period beyond the thirty days specified in Rule 73(a), in spite of the express provision of Rule 6(b) that the District Court "may not extend the period for taking any action under rules . . . 73(a) . . ." As Chief Judge Biggs said in his dissenting opinion (Appendix hereto p. 29):

> "This . . . is a controversion of [the] rules and, indeed, of the ordered plan created for the speedy disposition of business in United States district courts as required by Rule 1."

The "controversion" of which the Chief Judge speaks stems from the refusal of the majority to follow the plain language of the Rules and from its deciding the jurisdictional question as if it were sitting prior to the 1946 amendments, which were directed in part toward this very problem.

Prior to the 1946 and 1948 amendments to the Federal Rules it was often a difficult problem to determine when a judgment was appealable. There was a "general rule" that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend, or modify a judgment was seasonably made and entertained, the time for appeal did not begin to run until disposition of the motion. See *Leishman v. Associated Electric Co.*, 318 U. S. 203, 205, 63 S. Ct. 543 (1943).[1] Since the Rules as originally drafted

1. The Advisory Committee in drafting the amendments to the Rules meant to make it clear that the "general rule" of the *Leishman* case should not be applied in appeals to the circuit courts, and the new prohibition in Rule 6(b) against the District Court's extending the time for taking certain action was directed specifically to that end. See the Committee's Note quoted in 2 MOORE'S FEDERAL PRACTICE, ¶6.01[6] (2d ed. 1948).

gave the district courts great leeway, with but few exceptions, in extending the time within which a party was required to take action; since Rule 6(c) removed from federal jurisprudence the doctrine that the court had jurisdiction to affect a judgment only during the term of the court in which it was entered; and since there was therefore the ever-present possibility that the District Court might entertain a post-judgment motion which would affect the "finality" of the judgment, it was often impossible to say whether a given judgment was or was not appealable. It depended upon what the district court did or might do with the judgment.[2]

In 1946 the Advisory Committee set out to cure the problem of finality by providing for a mandatory appeal period [Rule 73(a)], by setting definite and short time limits within which motions filed by a party could affect

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2. See *Leishman v. Associated Electric Co.*, 318 U. S. 203, 63 S. Ct. 543 (1943), *supra* p. 5. The uncertainty which could develop is most clearly seen in the bankruptcy cases and cases involving the question of "finality" for purposes of requesting certiorari to the U. S. Supreme Court. For instance, there is the rule that filing a seasonable petition for rehearing in the lower court suspends the running of the time for petitioning for a writ of certiorari. But the mere filing of a second petition for a rehearing does not suspend the period. If, however, the lower court entertains the second petition for rehearing, that does suspend the period, and so on. *Gypsy Oil Company v. Escoe*, 275 U. S. 498, 48 S. Ct. 112 (1927). The rules in bankruptcy appeals were basically the same. *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201 (1940). One of the principal purposes of the revised Federal Rules was to avoid the delay so often resulting from the application of these doctrines. As Professor Moore says in his Comment to revised Rule 73(a), Moore's Federal Rules and Official Forms (1947), at page 141:

> "The philosophy of amended Rule 6(b) is that since the effect of the expiration of a term of court has been eliminated there must be some limitation upon the court's power to deal with a judgment in the interest of finality . . . In establishing this principle, the Committee consciously avoided the rule established in bankruptcy proceedings . . ."

See also the Third Circuit's own opinion in *Raughley v. Pennsylvania Railroad*, — F. 2d — (1956), footnote 3, Appendix hereto p. 38.

the appeal period [Rules 50(b) and 59],[3] by providing that the district court had no power to disturb either the appeal period or the times within which the parties had to move in order to affect that period [Rule 6(b)], and by providing that a variety of motions not subject to the aforementioned short time limits should not affect the finality of the judgments toward which they were directed [Rule 60(b)]. The Committee recognized that this meant changing somewhat the then-existing concept of "finality", but thought that such a change was necessary to carry out fully the avowed purpose of the Federal Rules, as stated in Rule 1, to secure "speedy . . . determination of every action." The Advisory Committee said in its notes to the proposed 1946 amendment to Rule 6(b), 2 MOORE'S FEDERAL PRACTICE, ¶6.01[6] (2d ed. 1948):

> "The question to be met under Rule 6(b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? . . .
>
> • • •
>
> "The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said that a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules *whose time limits may not be set aside* . . .
>
> "The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgment ends with the term requires a substitute limitation, and that unless Rule 6(b) is amended to *prevent enlargement of the times* . . . no one can say when a judgment is final." (Emphasis supplied.)

The scheme now incorporated in the Rules is so direct and simple that anyone reading the rules literally can readily

3. Rule 52(b) contains the same 10 day time limit for certain motions in non-jury cases as Rules 50 and 59 provide for jury cases.

say when a judgment is final. It is merely a matter of computing time, and works as follows:

In a civil jury case the judgment is automatically entered upon the jury verdict [Rule 58]. That judgment is final, and any appeal must be taken within 30 days [Rule 73(a)]. There are three motions which may affect the judgment when acted upon and which, when filed within 10 days of the entry of the judgment, do affect the appeal period [Rule 73(a)]. These are a motion for judgment under Rule 50(b), a motion for a new trial under Rule 59, or a motion to alter or amend the judgment, also under Rule 59. There are many other post trial motions which can be made, and they are listed in Rule 60(b). Motions under that Rule, however, do not extend the appeal period, since they are not listed among the few motions which have such an effect under Rule 73(a). To make it perfectly clear that appealability is not to be affected by the mere possibility that the district court might vacate a judgment after motion under Rule 60(b), that Rule contains this sentence:

> "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

To solidify the entire scheme Rule 6(b) expressly forbids the district courts from extending the appeal period prescribed by Rule 73(a).

It is apparent, as Chief Judge Biggs points out in his dissent (Appendix hereto pp. 32-33), that both the language and intent of the Rules preclude a district court from extending the appeal period by ordering reargument of a motion for a new trial that it has previously denied. Rule 73(a) provides for an extension of the appeal period in civil jury cases only after "a timely motion under" Rules 50 or 59. A motion for reargument is not specified in either of those rules. If such a motion is considered a motion for a new trial under Rule 59, it is "timely" only if filed within *ten days of the judgment.*[4] In the present case the motion

4. *Terrasi v. South Atlantic Lines, Inc.*, 226 F. 2d 823, 21 Fed. Rules Serv. 73a.64, *case 4* (2d Cir. 1955), *infra*, p. 9.

for reargument was filed more than six months after the judgment.

Prior to the opinion of the majority in this case the federal courts had consistently decided their jurisdictional questions by assuming that the Rules meant what they said and not by expressing their own ideas as to how the Rules ought to have been written. Cf. footnote 11, *infra*, p. 13.

Thus in *Marten v. Hess*, 176 F. 2d 834 (6th Cir. 1949), defendant filed motions in the district court requesting rehearings of its motions for judgment and for a new trial, both of which had been denied. The lower court disposed of the motions for rehearing long after thirty days from the denial of the timely motions under Rules 50(b) and 59. Defendant did not appeal until after disposition of his motions for rehearing. The appeal was dismissed as too late, the court saying at page 835:

> "It is fundamental that the time requirement within which an appeal must be taken is mandatory and jurisdictional. It can not be extended by waiver, or order of the court. If notice of appeal is not filed within the time provided, the right to appeal is lost. A motion for rehearing of a motion to set aside verdict and judgment, and a motion for rehearing of a motion for a new trial are not motions that extend the time for appealing or affect the finality of the judgment under Rule 73. Since notice of appeal was not filed within the time prescribed by the said Rule, it follows that the appeal must be dismissed . . ."

In *Terrasi v. South Atlantic Lines, Inc.*, 226 F. 2d 823, 21 Fed. Rules Serv. 73a.64, *case 4* (2d Cir. 1955), a written motion for reargument of a new trial motion was filed within ten days of the entry of judgment. That unusual situation was possible because the original motion for new trial was made orally, heard by the court, and decided on the same day that judgment was entered. The court held

that the motion for reargument was in effect a motion for a new trial under Rule 59(a). Since it was filed within ten days of the entry of judgment, under the provisions of Rule 73(a) the appeal period was tolled until the court disposed of the motion. It is implicit in the decision of the Second Circuit that where a motion for reargument is filed more than ten days after *judgment*, no action by a district court can affect the appeal period.[5]

In *Deena Products Co. v. United Brick and Clay Workers*, 195 F. 2d 612 (6th Cir. 1952), more than thirty days after denial of a new trial motion, the district court reinstated the motion, considered it, and subsequently denied it. An appeal taken within thirty days of the second denial was held to be too late.

Cases involving points similar to the above are cited by Chief Judge Biggs at pages 31-33 of the Appendix hereto.

The two judges composing the majority of the court in the present case did not find justification for their decision in either the language or the scheme of the Rules. Apparently they merely stated their own notion as to how federal procedure *should* operate. They said (Appendix hereto p. 25):

> ". . . we have no doubt of the power of a district court, after denying or dismissing a motion for a new trial, to entertain an application for reargument of the motion and thereupon to reinstate the motion and order it to be reargued."[6]

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5. Chief Judge Clark, Reporter of the Advisory Committee, made this clear in the *Terrasi* case. His decision is quoted in Chief Judge Biggs' dissent, Appendix hereto p. 31. The majority in the present case recognized a conflict between its decision and that of the Second Circuit, but justified its stand by labelling Chief Judge Clark's discussion of the Rules "obiter dictum". Footnote 3 to majority opinion, Appendix hereto pp. 25-26.

6. Professor Moore, on the other hand, is quite clear that under the Rules the district courts have no such power. "Such a motion for reconsideration is in derogation of the policy of finality and should not be entertained by the court." 6 MOORE'S FEDERAL PRACTICE,

In support of this proposition, which might have been a valid one prior to the effective date of the amendments, the majority cited bankruptcy cases and cases which were decided prior to the Rules themselves. Chief Judge Biggs demonstrates that each of the cases cited by the majority in support of its position has no applicability in light of the Rules as they now exist (Appendix hereto pp. 29-30), and there is no need to discuss those cases further here.

By ignoring the specific provisions of the rules, the Third Circuit has put appealability back to where it was prior to the 1946 and 1948 amendments and back to what it was under federal bankruptcy procedure. It did that by giving novel significance to the term "reinstate", a word which appears nowhere in the Rules either expressly or by implication. Under the Third Circuit's ruling in this case district courts may "reinstate" motions already denied, and when such motions are "reinstated" within thirty days of their denial, the appeal period specified in Rule 73(a) is extended. In spite of the fact that Rule 6(b) expressly prohibits district courts from granting motions to extend the appeal period, the Third Circuit holds that such an extension may be accomplished indirectly by "reinstating" an old motion. We respectfully suggest that if any such purpose had been in the minds of the draftsmen of the Rules in writing them or in the contemplation of this Court in promulgating them, language appropriate to accomplish that purpose would have been used.

¶ 59.13[3] (2d ed. 1953). Chief Judge Biggs is in complete accord, Appendix hereto p. 33. The Committee Note to the 1946 amendment to Rule 73, 7 MOORE'S FEDERAL PRACTICE, ¶ 73.01[6] (2d ed. 1955), states:

> ". . . the better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction to entertain a motion . . . for a rehearing . . ."

And in its note to the 1946 amendment to Rule 6(c), 2 MOORE'S FEDERAL PRACTICE, ¶ 6.01[10] (2d ed. 1948), the Committee stated expressly that the Rules took from district courts the "*power* to disturb the finality of a judgment upon grounds other than those stated in these rules." (Emphasis supplied.)

The concept which the two-judge majority expressed as to "the power of a district court" is an old concept, unrelated to the present rules. It conflicts with the Rules themselves and with the decisions of other circuits interpreting the Rules. As Chief Judge Biggs said in his dissent (Appendix hereto p. 32):

> "When the motion to reconsider is not made within the ten-day period [computed from entry of the judgment], it would seem that both the Second Circuit following Terrasi [7] and the Sixth Circuit following Marten v. Hess [8] would agree that the motion would have no effect on the appeal period." (Footnotes supplied.)

It is respectfully submitted that this court should not permit this conflict to remain unresolved.

Chief Judge Biggs correctly analyzes the effect of the majority decision as follows (Appendix hereto pp. 33-34):

> "The majority position would permit a trial judge, by 'entertaining' numerous motions to reconsider denials of previous motions, to extend the time for taking an appeal almost indefinitely. Such a result flies in the face of the clear language and intent of Rules 6(b), 59(b) and 73(a)."

The decision of this case, if followed, means:

1. That although the Advisory Committee in drafting the 1946 and 1948 amendments to the Rules felt that it was mandatory "that there should be a definite point where it can be said that a judgment is final",[9] there is now no final moment that a district judge may not postpone;

2. That although the Advisory Committee thought it more important to insure "finality" than to permit lower

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7. 226 F. 2d 823 (1955), *supra*, p. 9.
8. 176 F. 2d 834 (1949), *supra*, p. 9.
9. Notes to proposed 1946 amendment to Rule 6(b), 2 Moore's Federal Practice, ¶ 6.01[6] (2d ed. 1948), *supra*, p. 7.

courts freely to reconsider their actions upon post-trial motions, and drafted the rules accordingly,[10] there is now virtually no limitation upon the power of the district courts to affect "finality" at will;[11]

3. That although the Advisory Committee considered this Court's opinion in *Leishman v. Associated Electric Co.*, 318 U. S. 203, 63 S. Ct. 543 (1943), and wrote the Rules in order to avoid the impact of that decision,[12] the doctrine of that case has been made applicable to appeals to the circuit courts in civil actions and extended even to jury cases;

4. That although the Advisory Committee consciously meant to avoid the procedural decisions applicable in bankruptcy cases,[13] those decisions are now authority for proper disposition of civil actions under the amended Federal Rules;[14]

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10. Footnote 2, *supra*, p. 6.

11. Certainly if the court may toll the appeal period by "reinstating" a new trial motion upon a petition for reargument filed more than ten days after judgment, for which there is no provision in the Rules, it may do so upon its own motion, for which there is also no provision in the Rules. Such power in a district court is wholly inconsistent with the statement of this court that "the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged." *F. T. C. v. Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211, 73 S. Ct. 245 (1952).

12. Footnote 1, *supra*, p. 5.

13. Notes to proposed 1946 amendment to Rule 73(a), quoted in 7 MOORE'S FEDERAL PRACTICE, ¶ 73.01[5] at p. 3112 (2d ed. 1955); 3-A OHLINGER, FEDERAL PRACTICE 613 (rev. ed. 1948); 5 F. R. D. 486 (1946).

14. It is impossible to explain the Third Circuit's confusion on this point. In the present civil action Circuit Judges Maris and Goodrich cite a bankruptcy case to support their position: *Klein's Outlet v. Lipton*, 181 F. 2d 713 (2d Cir. 1950), cert. denied 340 U. S. 833 (see footnote 2, majority opinion, Appendix hereto p. 25). In a civil action decided about a month after this one, Circuit Judges Goodrich and Staley say that bankruptcy cases "are not relevant in a case like this", citing the authorities in footnote 13, *supra:* Majority opinion in *Raughley v. Pennsylvania Railroad*, — F. 2d — (1956), Appendix hereto p. 38.

5. That although the Advisory Committee, with the aim of curing the "confusion and split in authority"[15] concerning the time limits for the filing of motions, adopted specific time limits, those carefully prescribed time limits may now be avoided by the device of "reinstating" old motions; and

6. That although Rule 59(a) "explicitly includes all applications for rehearing as previously understood",[16] there is now also available a motion for "reconsideration", which is not mentioned in Rule 59, which is not subject to the time limitations of Rule 59 or any other rule, and which the Third Circuit allows on the authority of Corpus Juris Secundum, which, in turn, refers neither to the Federal Rules nor to any federal case.[17]

Certainly a decision which produces such results, in the words of Chief Judge Biggs, "flies in the face of the clear language and intent of Rules 6(b), 59(b) and 73(a)" (Appendix hereto p. 34).

Not only is the decision inconsistent with the Rules but it is bound to create confusion and to hamper the orderly disposition of cases in the federal courts. Confusion already exists. Delay and useless expense are inevitable consequences.[18] The confusion is well demonstrated by comparing the Third Circuit's opinion in this case (*Kelly*)

15. See the Third Circuit's own opinion in *Raughley v. Pennsylvania Railroad*, — F. 2d — (1956), Appendix hereto p. 38.

16. Chief Judge Clark, Reporter of Advisory Committee, in *Terrasi v. South Atlantic Lines, Inc.*, 226 F. 2d 823, 824, 21 Fed. Rules Serv. 73a.64, *case 4* (2d Cir. 1955), *supra*, p. 9.

17. Footnote 4 to majority opinion, Appendix hereto p. 26, citing 60 C. J. S., Motions and Orders § 40.

18. Since the thirty-day appeal period is jurisdictional, no practitioner in the federal courts can afford to risk delaying his appeal in any case where he is uncertain about the question of appealability. Until the Circuit Court dismisses the appeal, which may be on its own motion, there is delay. In the meantime, as in the instant case, the party taking the appeal may have had the expense of preparing and printing the brief and record in addition to other costs incident to the appeal.

with the same court's decision only a month later in *Raughley v. Pennsylvania Railroad Co.*, — F. 2d —, 22 Fed. Rules Serv. 73a.64, *case 3* (1956). That was a case where prior to trial defendant filed a motion for judgment on the pleadings. The relevant portions of the docket entries were as follows (see the opinion appended hereto pp. 35-36):

Dec. 10, 1954. Opinion, Kirkpatrick, Ch. J. granting judgment in favor of defendant, filed.

Dec. 10, 1954. Judgment in favor of defendant with costs, filed.

Jan. 4, 1955. Plaintiff's Petition for Reargument and Order of Court allowing same filed.

Feb. 28, 1955. Argued sur Petition for Reargument on motion for judgment on the pleadings.

May 12, 1955. Opinion, Kirkpatrick, Ch. J., sur reargument filed.

May 16, 1955. Order of Court denying motion for reargument, filed.

May 16, 1955. Plaintiff's notice of appeal, filed.

The Third Circuit held that the "Petition for Reargument", coming as it did more than ten days after the entry of judgment, was too late to toll the appeal period which ran from the entry of judgment. The opinion was written by Circuit Judge Goodrich, who, with Circuit Judge Maris, composed the majority in *Kelly*. Circuit Judge Kalodner dissented since he thought that *Raughley* was ruled by *Kelly* (Appendix hereto pp. 42-43). Apparently Circuit Judges Goodrich and Staley, the majority in *Raughley*, thought there was no conflict between the two cases.

Attempting to rationalize the two decisions the bench and bar might draw any of the following conclusions:

a. Rules governing jurisdiction on appeal following a motion for reargument of a motion for judgment on the pleadings are different from those following a motion for reargument of a motion for new trial, because:

(1) To toll the appeal period, a *motion for reargument of a motion for judgment on the pleadings* must be filed within ten days of the entry of judgment—*Raughley;* whereas

(2) A *motion for reargument of a motion for a new trial* tolls the appeal period if it is filed, and granted, any time within thirty days of the denial of the motion for new trial, no matter how long after the entry of judgment that may be—*Kelly.*

b. Jurisdiction on appeal may turn upon whether the motion for reargument follows the *grant* of the original motion in the lower court rather than its *denial,* because:

(1) Where a motion for judgment on the pleadings is *granted,* a motion for reargument tolls the appeal period only if filed within *ten* days of the entry of judgment—*Raughley;* whereas

(2) Where a motion for a new trial is *denied,* any time within *thirty* days thereafter the grant of a reargument tolls the appeal period, no matter how long after the entry of judgment the motion for reargument is filed—*Kelly.*

c. Stating proposition b. in a slightly different way, jurisdiction on appeal may turn upon which party filed the original motion, because:

(1) Where the decision is *in favor of the party who filed the original motion,* his opponent's motion for reargument, no matter what action the court takes on it, will not toll the appeal period unless it is filed within ten days of the entry of judgment —*Raughley;* whereas

(2) Where the decision is *against the party who filed the original motion,* the court may any time after

the entry of judgment "reinstate" his motion, and toll the appeal period, by granting a petition for reargument, provided only that the newly running appeal period has not expired before such petition is *granted—Kelly.*

d. Where a petition for reargument is filed within thirty days of the denial of the original motion, and the petition is *granted* thereafter, the time for taking an appeal is uncertain, since neither decision touches on the point.

No argument is necessary to demonstrate that such bizarre results were not intended by this Court in promulgating the Federal Rules. Neither in the language of the rules nor in their overall plan can anything be found which would justify the utterly confused situation which the *Kelly* and *Raughley* cases represent. We respectfully submit that *Raughley,* in which the Third Circuit accepted the Rules as meaning what they say (Appendix hereto p. 40), was correctly decided, but that *Kelly,* in which the Third Circuit ignored the Rules and substituted for their plain language its own concept of the time for appeal, was incorrectly decided. The two cases can be brought into harmony with each other and with the other circuit court opinions interpreting the amended Rules [19] only by this Court's reversing the *Kelly* decision.

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19. We believe that the cases other than the instant one are in accord and interpret the Rules properly. In non-jury cases a motion for rehearing is comparable to a motion for new trial, and the courts treat it as such, applying the time limits for such motions. *Fine v. Paramount Pictures,* 181 F. 2d 300 (7th Cir. 1950); *Slater v. Peyser,* 200 F. 2d 360 (D. C. Cir. 1951); *Virginia Land Co. v. Miami Shipbuilding Corp.,* 201 F. 2d 506 (5th Cir. 1953); *Calvin v. Calvin,* 214 F. 2d 226 (D. C. Cir. 1954), cert. denied 341 U. S. 942. Where there is a motion to open a default judgment, denial of the motion is itself an appealable order. A motion for rehearing is again equivalent to a motion for a new trial under Rule 59. When filed within ten days, it tolls the appeal period. *Hicklin v. Edwards,* 226 F. 2d 410, 21 Fed. Rules Serv. 73a.64 *Case 3* (8th Cir. 1955). When filed later than that, it does not toll the appeal period. *Morely v. United States,* 207 F. 2d 654 (6th Cir. 1953).

C. Conclusion.

The Federal Rules of Civil Procedure are excellent examples of clarity and simplicity. When applied according to their tenor, they insure, to the extent that procedural rules are capable of so doing, the "speedy . . . determination of every action" [Rule 1]. Courts should not write into the Rules procedures not only not provided by the Rules themselves but actually in conflict with them. But that is what two judges of the Third Circuit have done in this case, and, as a result, clear, simple rules specifying the time for appeal have become confusing, unreliable doctrines. If the majority decision stands, an untold number of litigants will lose substantive rights, the inevitable result of bewildering, uncertain procedure.

It is therefore respectfully submitted that this Court should grant this petition for certiorari, should reverse the decision of the Third Circuit, and should direct that court to hear petitioner's appeal as it has jurisdiction to do.

Respectfully submitted,

PHILIP PRICE,
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Attorneys for Petitioner.

BARNES, DECHERT, PRICE, MYERS & RHOADS,
Of Counsel.

Appendix.

STATUTE INVOLVED.

JUDICIAL CODE, SECTION 1291, ACT OF JUNE 25, 1948, c. 646, 62 STAT. 929, 28 U. S. C. § 1291.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED
(28 U. S. C.)

Rule 73. Appeal to A Court of Appeals

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact,

whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

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Rule 50(b). Reservation of Decision on Motion

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

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Rule 59. New Trials; Amendment of Judgments

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On

a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

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Rule 60(b). Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denom-

inated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 6(b). Enlargement

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,689

WILLIAM KELLY

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 3, 1955

Before BIGGS, *Chief Judge,* and MARIS and GOODRICH, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 29, 1955)

By MARIS, *Circuit Judge*

The plaintiff has moved to dismiss an appeal by the defendant from a judgment entered in the district court upon a verdict in the plaintiff's favor rendered in an action brought under the Federal Employers' Liability Act. The motion is made upon the ground that the judgment is not yet final and hence not appealable.

The judgment was entered on the verdict in the district court on November 24, 1954. Five days later the defendant filed its motions for judgment in its favor n.o.v.

and for a new trial. The motions came on for argument in the district court on May 20, 1955 and on June 6, 1955 the district court entered its order denying the motion for judgment n.o.v. and dismissing the motion for a new trial. The latter action was stated to be upon the ground that the motion for a new trial had been abandoned by the defendant. Two days later the defendant filed a petition for reargument of its motion for a new trial, asserting that it had not abandoned the motion, and on June 16, 1955 the district court granted the defendant's petition for a reargument of its motion for a new trial.[1] We were informed at bar that reargument had not yet taken place. On June 28, 1955 the defendant filed in the district court its notice of appeal from the judgment which had been entered against it on November 24, 1954.

The plaintiff contends that the appeal thus taken by the defendant was premature since the defendant's timely motion for a new trial had been reinstated by the district court's order granting reargument and was pending and undetermined at the time the appeal was taken. We think that this contention is correct and that the appeal must, therefore, be dismissed.

Civil Procedure Rule 73(a) provides in pertinent part:

> "When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from. . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from

1 On the same day the court ordered that execution or enforcement of the judgment be stayed until 10 days after "the final disposition of the issues raised by defendant's petition for reargument." We assume the court here meant the issues raised by the motion for a new trial since the issues raised by the petition for reargument would appear to have been disposed of when the petition was granted.

the entry of any of the following orders made upon a timely motion under such rules: . . . denying a motion for a new trial under Rule 59."

It will thus be seen that the running of the time for taking an appeal from a judgment in a civil action is terminated by the making of a timely motion for a new trial and does not commence to run again until the motion has been denied. Rule 59(b) provides that a motion for a new trial shall be served not later than 10 days after the entry of the judgment. In the present case the motion was filed five days after the entry of judgment. There is no suggestion that it was not served at the same time. It was, therefore, clearly timely.

The defendant, however, points to the fact that the motion was dismissed by the district court on June 6, 1955 and it argues that the time for appeal commenced to run again on that date and that the action of the district court in reinstating the motion and granting reargument of it was in violation of Rule 6(b) and did not operate to stop the running of the appeal period. We do not agree. On the contrary we have no doubt of the power of a district court, after denying or dismissing a motion for a new trial, to entertain an application for reargument of the motion and thereupon to reinstate the motion and order it to be reargued.[2] Moreover such action, if taken more than 10 days after the entry of judgment, does not violate the prohibition of Rule 6(b) against extending the time fixed by Rule 59(b) for serving a motion for a new trial. For an application for reargument of a prior motion for a new trial is not to be regarded as itself a motion for a new trial or even as a renewal of such a motion.[3] It is simply a

2 Dunagan v. Appalachian Power Co., 4 Cir. 1928, 29 F. 2d 58, 59; Klein's Outlet v. Lipton, 2 Cir. 1950, 181 F. 2d 713, 714, cert. den. 340 U.S. 833; Nielsen v. Arabian American Oil Co., 5 Cir. 1953, 206 F. 2d 391. See also Blaine v. Peters, C.A.D.C. 1952, 194 F. 2d 887.

3 The suggestion to the contrary in Terrasi v. South Atlantic Lines, 2 Cir. 1955, F. 2d , must be regarded as obiter dictum since the original

request that the court reconsider its action upon the original motion. If the reargument is granted the original motion is heard anew upon the original papers just as if it had never previously been heard or determined.[4]

It may be conceded that if the district court does not grant reargument of the motion for a new trial until after the time allowed for appeal by Rule 73(a) has run from the original denial of the motion the action of the court in subsequently doing so will not affect the appealable finality of the judgment originally entered. For the mere filing of an application for reargument of a motion for a new trial does not itself stop the running of the appeal period.[5] And the subsequent action of the court in again denying the motion for a new trial could not operate to stop the running of time which had already fully run. But if the court directs reargument of the motion for a new trial and thereby reinstates it within the appeal period the revived pendency of the original motion operates again to terminate the running of the time for appeal. In such case the appeal time will commence to run again and will be computed from the date of entry of the court's subsequent order denying the motion, if it is denied. Meanwhile the judgment which is the subject of the pending motion for a new trial must be regarded as lacking appealable finality.

In the case before us the district court directed reargument of the defendant's motion for a new trial[6] and thereby reinstated it within two days after the motion had been dismissed by it. As we have seen the original motion

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motion for a new trial in that case, being oral, could hardly be regarded as a proper motion for a new trial complying with Rule 59(b). Fine v. Paramount Pictures, 7 Cir. 1950, 181 F. 2d 300. Accordingly the motion for reargument of the motion for a new trial in the Terrasi case was the first proper motion which had been made in the case and, since it was filed within 10 days after the entry of judgment, it was quite properly held to stop the running of the time for appeal.

4 60 C.J.S. Motions and Orders § 40.

5 Marten v. Hess, 6 Cir. 1949, 176 F. 2d 834; Deena Products Co. v. United Brick & Clay Workers of America, 6 Cir. 1952, 195 F. 2d 612; Randolph v. Randolph, C.A.D.C. 1952, 198 F. 2d 956.

6 It will be noted that the defendant's petition for reargument did not raise new questions but merely called to the district court's attention the fact that it had not abandoned the motion for a new trial.

for a new trial was filed within the time limited by Rule 59(b). Having been reinstated for reargument it must still be regarded as having been so filed and must accordingly be given the effect of stopping the time for appeal while it remains pending and undetermined. Since the reinstated motion has not yet been denied by the court, the judgment appealed from must be regarded as still lacking appealable finality.

Accordingly the appeal will be dismissed.

Biggs, *Chief Judge*, dissenting.

I think the judgment is an appealable one under Section 1291, Title 28, USC and that the decision of the majority is erroneous.

On November 24, 1954, the plaintiff secured a verdict against the defendant-appellant for $75,760. Under Rule 58, FRCP, the clerk entered judgment forthwith on this verdict. On November 29, within ten days after the entry of judgment, the defendant-appellant made two timely motions, one for judgment n.o.v. under Rule 50(b), and another for a new trial under Rule 59(b). On June 6, 1955, the court below "dismissed" the motion for a new trial on the ground that it had been abandoned and denied the motion for judgment n.o.v. Two days later, on June 8, the defendant-appellant filed a petition for reargument. Eight days later, on June 16, the court below granted reargument on the petition for a new trial and stayed enforcement of the judgment. On June 28, the defendant-appellant filed its notice of appeal.

Rule 6(b), as amended, provides that a United States district court "... may not extend the time for taking any action under rules ... 50(b) ... 59(b) ... and 73(a) ..., except to the extent and under the conditions stated in them." Rule 73(a) also was amended and

provides precise limitations of time for the taking of appeals, naming specific rules under which motions made terminate the running of time for appeal. Rule 73(a) also provides that when the court denies a motion made under one of the rules so designated, the time for taking the appeal commences to run again. One of the rules named is Rule 59 and one of the motions which terminates the running of time for an appeal is a motion for a new trial. Rule 59(b) provides that "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment."

These amendments were designed to eliminate the uncertainties then attendant on the times for taking appeals and to limit the power of the trial court to enlarge the periods during which appeals could be taken, Rule 6(c) having done away with the so-called "End-of-Term" rule. See Committee Note of 1946 to Amended Rule 6(b), Moore's Federal Practice, Vol. 2, ¶ 6.01[6] (2d ed. 1948). Cf. our decisions in Green v. Reading Co., 180 F. 2d 149, 150 (1950), and Healy v. Pennsylvania R. Co., 181 F. 2d 934, 936 (1950).

Everyone agrees that the filing of the timely motions on November 29, 1954 stopped the running of the time for the taking of an appeal. There also seems to be an accord in the view that when the court below on June 6, 1955, dismissed the motion for a new trial and denied the motion for judgment n.o.v., the period of time for taking the appeal provided by Rule 73(a) started running again. At this point, however, comes disagreement. The defendant-appellant contends that, when the petition for reargument was granted, the order granting reargument did not terminate for a second time the running of the period for the taking of an appeal. Inherent in this view is, of course, the concept that the granting of reargument did not destroy the finality of the judgment. The plaintiff-appellee, on the other hand, insists that the petition for reargument was not

the kind of a pleading (motion) at which Rule 6(b), read in the light of Rules 59(b) and 73(a), was aimed. This latter view, which the majority accept, is a controversion of those rules and, indeed, of the ordered plan created for the speedy disposition of business in United States district courts as required by Rule 1.

The majority ruling of this court rejects the defendant-appellant's conception of the operation of the rules referred to in totality. The majority states: "[W]e have no doubt of the power of a district court, after denying or dismissing a motion for a new trial, to entertain an application for reargument of the motion and thereupon to reinstate the motion and order it to be reargued.[2]" For this proposition, the majority cites several authorities. The first of these, Dunagan v. Appalachian Power Co., 29 F. 2d 58 (4 Cir. 1928) was decided not only before the pertinent amendments to the Rules but almost a decade before the Rules themselves were adopted.[1] In Klein's Outlet v. Lipton, 181 F. 2d 713 (2 Cir. 1950), the appeal was in fact dismissed, not as premature, but as too late. Moreover, that case involved a motion to reargue a bankruptcy decision, a first reconsideration,[2] and not a motion to reargue a motion for a new trial, a request for a second reconsideration of the judgment such as we have here.[3] Nielsen v.

1 Professor Moore's comment on the case further points up its inaptness: "It should be noted that it is apparent from the opinion that the time in which to move originally for new trial at that time had not yet expired; nor in fact does it appear that any judgment was entered at all at that time." Moore's Federal Practice, Vol. 6, ¶ 59.13[3], n.3 (2d ed. 1953).

2 The court characterized the motion as "in effect, a second reargument" because the referee's report was argued and reargued before the district court rendered its decision.

3 The different effect of the two motions is noteworthy. A motion for rehearing in bankruptcy will not extend the appeal period unless the court entertains it. Klein's Outlet v. Lipton, *supra*, and cases cited therein. A motion for a new trial under Rule 59(b) automatically stops the running of the appeal time under Rule 73(a).

The relevance of a bankruptcy decision is questionable. See Committee Note of 1946 to Amended Rule 73(a), quoted in Moore's Federal Practice, Vol. 7, ¶73.01[5] at p. 3112 (2d ed. 1955) as follows: "In bankruptcy proceedings it is established that as the bankruptcy court has no terms it has the power at any time for good reason to revise its judgments or orders upon seasonable application and before rights have vested on the faith of its action. A motion

Arabian American Co., 206 F. 2d 391 (5 Cir. 1953) concerned reconsideration of the denial of a motion to quash a summons and dismiss an action, an interlocutory and non-appealable order. Blaine v. Peters, 194 F. 2d 887 (D.C. Cir. 1952) held correctable under Rule 60(a) as a "clerical mistake" the inadvertent denial of motions for judgment n.o.v. and a new trial on the same day the motions were made. The cases cited do not support the majority's major premise.

The majority goes on to say, in substance, that the granting of reargument on a petition filed within ten days of the order of denial or dismissal of the motion does not violate the prohibition of Rule 6(b) against extending the time fixed by Rule 59(b) for serving a motion for a new trial; for, say the majority, "an application for reargument of a prior motion for a new trial is not to be regarded as itself a motion for a new trial or even as a renewal of such a motion . . . If the reargument is granted the original motion is heard anew upon the original papers just as if it had never previously been heard or determined."

I think that this argument begs the question. It is true, as the majority points out, that Rule 59(b) provides that a motion for a new trial shall be served not later than ten days after the entry of the judgment and that the motion for a new trial here was served five days after entry of the judgment. The petition (motion) for reargument in literal view certainly is not one of the motions referred to in Rule 6(b), the time for which may not be extended by the district court. But to say, as does the majority, that the petition for reargument is not to be "regarded" as a

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so to do may be entertained even after the expiration of time for appeal, and such appeal time will start running anew upon the disposition of the motion. [citing cases]. In ordinary civil actions governed by the Federal Rules of Civil Procedure, however, the better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction to entertain a motion, as for new trial or for a rehearing or to vacate or amend, as the case may be and cannot thereafter entertain such a motion and thereby start the appeal time running anew. *Safeway Stores, Inc. v. Coe* (App DC 1943) 136 F2d 771; *Junino v. Morales & Tio* (CCA1st, 1944) 139 F2d 946; *Nealon v. Hill* (CCA9th, 1945) 149 F2d 883; *Norris v. Camp* (CCA10th, 1944) 144 F2d 1."

motion for a new trial or the renewal of such a motion but only as a request that the court reconsider its prior unfavorable action seems an exercise in dialectics. It cannot be denied that the petition is a plea for reconsideration, but it is also the practical equivalent of a renewal of the motion for a new trial and the practical equivalent of a motion for a new trial. The fact that the petition is based on the original papers seems immaterial when one contemplates the result which the amendments to the rules were intended to effect, the speedy disposition of business. Compare National Farmers Union Auto. & Cas. Co. v. Wood, 207 F. 2d 659 (10 Cir. 1953).

In respect to this issue the Court of Appeals for the Second Circuit, by Chief Judge Clark, Reporter of the Advisory Committee on the Federal Rules of Civil Procedure, stated recently in Terrasi v. South Atlantic Lines, Inc., — F. 2d — (1955): "A motion for reargument of a motion for a new trial is of course nothing but a motion for a rehearing thereof, and thus in essence is itself but an application for a new trial under F.R. 59(a). . . . Slater v. Peyser, D.C. Cir., 200 F. (2d) 360, 361. . . . The very reasons which led the Advisory Committee to recommend the amended Rule 73(a) in the interest of clarity and to avoid confusion as to the proper time for appeal apply equally to this motion. Of course it must be timely made within ten days [from the entry of judgment], as specified in F. R. 59(b), and thus in any event cannot delay the proceedings unduly." Since the motion for reargument in Terrasi had been made within the ten-day period, the court held that the running of the appeal period was stayed.

The majority "concedes" that "if the district court does not grant reargument of the motion for a new trial until after the time allowed for appeal by Rule 73(a) has run from the original denial of the motion the action of the court in subsequently doing so will not affect the appealable finality of the judgment originally entered. For the mere filing of an application for reargument of a motion

for a new trial does not of itself stop the running of the appeal period.[3]'' Inherent in the cases cited in footnote 5 of the majority opinion is the principle that the district court does not have jurisdiction to entertain a motion to reconsider denial of the motion for a new trial, at least when the motion to reconsider is made more than ten days after entry of judgment. Cf. for example, Marten v. Hess, 176 F. 2d 834, 835 (6 Cir. 1949), in which it is stated: "A motion for rehearing of a motion to set aside verdict and judgment, and a motion for rehearing of a motion for a new trial are not motions that extend the time for appealing or affect the finality of the judgment under Rule 73." Cf. also Randolph v. Randolph, 198 F. 2d 956 (D.C. Cir. 1952), and Deena Products Co. v. United Brick & Clay Workers of America, 195 F. 2d 612 (6 Cir.), cert. denied, 344 U.S. 822 (1952). If my interpretation of these decisions be correct, there is no need to discuss the majority's conclusion that, if the district court grants, within the appeal period, reargument of the motion for a new trial, "the revived pendency of the original motion operates again to terminate the running of the time for appeal."

The theoretical conflict between the cases just cited and Terrasi v. South Atlantic Lines, Inc., *supra*, is of no importance here. Terrasi presents the rare case where the motion to reconsider itself is made within ten days of the entry of judgment.[4] When the motion to reconsider is not made within the ten-day period, it would seem that both the Second Circuit following Terrasi and the Sixth Circuit following Marten v. Hess would agree that the motion would have no effect on the appeal period.

The substantial question presented for our determination is whether the court below, some six months after entry of judgment, had the power to reconsider its dismissal of the motion for a new trial. That such a course lay within

4 Professor Moore suggested that "[i]f in a rare case a motion to reconsider can be and is served not later than 10 days after the entry of judgment, the policy behind the time limits of Rule 59 would not preclude consideration." Moore's Federal Practice, Vol. 6, ¶ 59.13[1], (2d ed. 1953).

the power of the district court prior to the amendments to the Rules is indubitable. See our decisions in Green v. Reading Co. and Healy v. Pennsylvania R. Co., *supra*. It was a reasonable thing, I think, to give to a trial court an opportunity to correct a decision if it was of the view that it had committed error. But the Rules are made by the Supreme Court, and we may not revise them here. Because a trial court's reconsideration of their denials of such motions, considerable delay in appeals had been encountered, particularly in the field of bankruptcy law. Moore makes it plain in his comment on Revised Rule 73(a) what he thought the Advisory Committee was getting away from. That was uncertainty as to finality in respect to the appeal period. He said, "In establishing this [new] principle, the Advisory Committee consciously avoided the rule established in bankruptcy proceedings. . . ."[5]

The cases solidly support the view that, by the time the district court "dismissed" the motion for a new trial in the case at bar, that court had lost jurisdiction to consider the matter further. The ten days within which the defendant-appellant could move for a new trial were the ten days immediately following "the entry of judgment" on November 24, 1954. There is no provision in the Rules for another ten-day period following the denial of the motion for a new trial. The situation is unlike that under Rule 73(a) where the appeal time begins to run a second time upon the denial of such a motion. Terrasi v. South Atlantic Lines, Inc., *supra;* Marten v. Hess, *supra;* Moore's Federal Practice, Vol. 6, ¶¶ 59.09[1], 59.13[1], 59.13[3] (2d ed. 1953). *Cf.* Randolph v. Randolph, *supra*, so holding with regard to Rule 59(e). See also National Farmers Union Auto. & Cas. Co. v. Wood, *supra;* Bergeron v. Mansour, 152 F. 2d 27 (1 Cir. 1945); Safeway Stores v. Coe, 136 F. 2d 771 (D.C. Cir. 1943); William Goldman Theatres v. Loew's, 83 F. Supp. 455 (E.D. Pa. 1949). The

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5 Moore's Federal Practice, Vol. 7, ¶ 73.09[4] at p. 3143 (2d ed. 1955). See also note 3, *supra*.

majority position would permit a trial judge, by "entertaining" numerous motions to reconsider denials of previous motions, to extend the time for taking an appeal almost indefinitely. Such a result flies in the face of the clear language and intent of Rules 6(b), 59(b) and 73(a).

Blaine v. Peters, *supra*, presents the only exception I have found to this inflexible rule. There the trial judge inadvertently denied motions for a judgment n.o.v. and for a new trial on the same day they were made. The Court of Appeals held that this error could be corrected later than ten days after entry of the original judgment as a "clerical mistake" under Rule 60(a). However, we do not see how the trial judge's "dismissal" of the motion for a new trial in the instant case can be categorized as either a "clerical mistake" under Rule 60(a) or a mistake of "a party or his legal representative" under Rule 60(b). *Cf.* Safeway Stores v. Coe, *supra;* Gray v. Dukedom Bank, 216 F. 2d 108 (6 Cir. 1954).

The judgment appealed from was final on June 6, 1955. The appeal should not be dismissed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,644

BURTON R. RAUGHLEY,
Appellant

v.

PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued November 1, 1955

Before GOODRICH, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed February 7, 1956)

By GOODRICH, *Circuit Judge.*

In this case the appellee has moved to dismiss the appellant's appeal, alleging it not to be timely brought. The case takes us to an examination and application of the rules of civil procedure having to do with the regulations of timeliness for appeal.

Specifically to present the problem the docket entries are herewith set out:

"Dec. 10, 1954. Opinion, Kirkpatrick, Ch. J. granting judgment in favor of defendant, filed.

Dec. 10, 1954. Judgment in favor of defendant with costs, filed. 12/13/54 Noted and Notice Mailed.

Jan. 4, 1955. Plaintiff's Petition for Reargument and Order of Court allowing same filed. (Noted and Notice mailed 1/5/55.)

Feb. 28, 1955. Argued sur Petition for Reargument on motion for judgment on the pleadings.

May 12, 1955. Opinion, Kirkpatrick, Ch. J., sur reargument filed.

May 16, 1955. Order of Court denying motion for reargument, filed. 5/17/55. Noted and Notice Mailed.

May 16, 1955. Plaintiff's notice of appeal, filed."

A casual inspection of these entries shows that the original judgment was granted December 10th and the notice of appeal was filed the following May 16th. Can the appellant bring his case within any of the provisions which extend the ordinary time for taking an appeal?

We start with rule 73 as amended in 1946 and 1948. 73(a) lays down the general rule that the appeal must be taken within thirty days from the entry of the judgment appealed from. Then follow certain exceptions not applicable here. Following these is certain language which had better be quoted.

". . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59. . . ."

The reference to the other rules takes us, of course, to those rules. Rule 50(b) has to do with motions for judgment n.o.v. Rule 52(b) has to do with amendment of findings of fact; rule 59, motions for new trial or to alter or amend the judgment.

The running of the time for appeal is terminated if timely motions under any one of these rules are made.[1] But each one of these rules provides that the motion, to be timely, must be made within ten days after (1) the receipt of the verdict or the discharge of the jury under rule 50(b) or (2) the entry of the judgment under the other rules.

Now is there any way in which such a motion, even though not timely made, can still have the effect of tolling the period for appeal? Specifically did the court below produce such an effect by entertaining and ruling (on May 12) on appellant's motion of January fourth? We turn to rule 6(b) as amended in 1946. This we shall have to quote:

> "(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b),

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1 It will be noted that not all post judgment motions are enumerated in 73(a). No mention is made of motions under 60(a) for the correction of clerical mistakes or under 60(b) for relief from judgment because of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc. The conclusion which reasonably follows from the omission of 60(a) and 60(b) is that motions under these rules do not affect the running of the time for appeal. Rule 60(b) expressly provides that a motion under that section "does not affect the finality of a judgment or suspend its operation. . . ." See 7 Moore, Federal Practice ¶ 60.29 at p. 331 (2nd ed. 1955).

59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

It will be noted that the last clause prohibits a court from extending the time for appeal under rule 73(a), "except to the extent and under the conditions stated in [it]." Rule 73(a) does not specifically authorize a court to extend this time by entertaining and ruling on an untimely motion. We think that it cannot so do. The same clause in rule 6(b) prevents a court from extending the time for making those motions which under 73(a) toll the time for appeal. Thus it seems apparent that 6(b) renders a court powerless to entertain such motions when untimely made.[2] The action of the trial court here in regard to the motion of January fourth must therefore be considered as a nullity.

The appellant has cited us quite a number of cases tending to show a possibility of a freer time limit than the above discussion would seem to indicate. Some of these cases are in bankruptcy. In bankruptcy a special rule prevails because a bankruptcy court has no terms. The bankruptcy cases are not relevant in a case like this.[3]

The other decisions, and there are some, were before the 1946 amendment to rules 6(b) and 73(a). Prior to the 1946 amendment there had been some confusion and a split in authority. What may be called the leading case against the enlargement of time where the rules have not been complied with is *Safeway Stores, Inc. v. Coe*, 136 F.2d 771 (D.

2 Such an effect is precisely what the Committee desired.

". . . Under the proposed amendment to rule 6(b) the court may not enlarge the time for taking action under rules 50(b), 52(b), 59(b), (d) and (e), and 60(b); and the time periods of these rules limit the court's power just as effectively as the term time, which they replace, formerly did. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L. J. 623, 627-630, 685-693." 7 Moore, Federal Practice ¶ 73.01 [5] at p. 3113 (2nd ed. 1955); 3-A Ohlinger, Federal Practice 614 (rev. ed. 1948); 5. F. R. D. 487 (1946). See also notes 4 and 5 *infra*.

3 See Committee note of 1946 to amended rule 73(a), quoted in 7 Moore, Federal Practice ¶ 73.01[5] at p. 3112 (2nd ed. 1955); 3-A Ohlinger, Federal Practice 613 (rev. ed. 1948); 5 F.R.D. 486 (1946). See also, Safeway Stores, Inc. v. Coe, 136 F.2d 771, 774 (D.C. Cir. 1943). Every case cited by appellant is specifically mentioned in the committee note. Some involve bankruptcy proceedings; the others have been made obsolete by the 1946 amendment.

C. Cir. 1943). The opinion by Chief Judge Groner is a thorough discussion of the problem. There is little to add to it. The conclusion there reached, prior to the 1946 amendment, is sustained by adequate authority [4] although as said above the decisions were not in complete accord.

The purpose of the 1946 amendment, according to the notes of the advisory committee, was to clear up the conflict of authority and to follow the rule of the *Safeway Stores* case above cited.[5] These rules, especially in the light of what the advisory committee said about the purpose of the amendments, seem clearly to settle this case in favor of the appellee's motion except for one point.

That point has to do with what happened in the chambers of the trial judge on December 20th or 21st, 1954. Counsel for the appellant says he dropped in to see the trial judge to call his attention to the fact that, in counsel's opinion, the decision had been rendered against him on a ground not argued or briefed by either party. He requested the court, he says, to permit a reargument so that the question could be presented. At the judge's request, the narrative runs, counsel left a memorandum of his authorities with the judge's secretary for examination. On January 3, 1955, counsel was informed by the court that the reargument would be allowed and it was, as the docket entries show.

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4 See Jusino v. Morales & Tio, 139 F.2d 946 (1st Cir. 1944); Boro Hall Corp. v. General Motors Corp., 6 F.R.D. 539 (E.D. N.Y. 1947).

5 The relevant portion of the Committee notes reads as follows:

". . . In ordinary civil actions governed by the Federal Rules of Civil Procedure, however, the better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction to entertain a motion, as for new trial or for a rehearing or to vacate or amend, as the case may be, and cannot thereafter entertain such a motion and thereby start the appeal time running anew. Safeway Stores, Inc. v. Coe App. D.C. 1943, 136 F.2d 771 . . ." 7 MOORE, FEDERAL PRACTICE ¶ 7301[5] at p. 3112 (2nd ed. 1955); 3-A OHLINGER, FEDERAL PRACTICE 613 (rev. ed. 1948); 5 F.R.D. 486 (1946). The Safeway approach has been consistently adopted in cases arising after the 1946 amendment. Slater v. Peyser, 200 F.2d 360 (D.C. Cir. 1952); Virginia Land Co. v. Miami Shipbuilding Corp., 201 F.2d 506 (5th Cir. 1953); Fine v. Paramount Pictures, 181 F.2d 300 (7th Cir. 1950); William Goldman Theatres v. Loew's, Inc., 83 F. Supp. 455 (E.D. Pa. 1949); Greenwood v. Greenwood, 16 F.R.D. 366 (E.D. Pa. 1954); United States v. 385.93 Acres of Land, etc., 16 F.R.D. 557 (D.N.H. 1954); Creedon v. Smith, 8 F.R.D. 162 (N.D. Ohio 1948).

Now the question is whether this informal visit to the judge's chambers will constitute a motion under any one of the rules above mentioned so as to comply with the requirement of timeliness. We have no record whatever; all the statements above made were given us by counsel upon the argument of the motion to dismiss. Counsel is a member of the bar of this Court in good standing and we have no reason to think that he is not giving us frankly the best of his recollection concerning the matter. It will be noted, however, that his opponent was not present at the conference. No notice was given to his opponent, so far as we know. No written motion was presented to the judge. No order was made by the judge concerning the submission of the memorandum. Nothing came out of the matter until the order for reargument made in January.

Rule 7(b) (of the Rules of Civil Procedure) is pretty explicit on the point and reads as follows:

> "(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

The purpose of the rule is, of course, to give a simple and elastic procedure without too much emphasis on form. There also appears in the rules already discussed an emphasis upon the element of promptness, with a desirable view in mind of keeping litigation moving instead of letting it drag. In the conduct of any organization which has many things to do, some form of system is required lest everything become so botched that the business cannot be done. This applies to the running of an army, a mercantile establishment or a court. We think rule 7(b)(1) is to be taken as meaning what it says. That being so, an informal request to a judge with no notice to an opposing party and

no order by the judge following the request cannot be considered as a motion under the other rules. A similar position was taken by this Court in *In re J. & M. Doyle Co.*, 130 F.2d 340 (1942).[6]

Our conclusion is that the appeal came too late and the appellee's motion to dismiss must be granted.

KALODNER, *Circuit Judge*, dissenting.

In order to arrive at the disposition which it made the majority had to make these two separate rulings:

First—Since judgment on the appellee's motion for summary judgment was granted December 10, 1954, the District Court's January 5, 1955 Order entered pursuant to appellant's motion for reconsideration filed that day, was a "nullity" because "(Rule) 6(b) renders a court powerless to entertain such motions when untimely made".

Second—"no written motion" was presented to the District Court on December 20th or December 21st by appellant's counsel when he made oral request for reconsideration as required by Rule 7(b)(1).

A brief statement of certain critical facts is essential in order to bring into sharper focus the issues presented.

The appellee filed a motion for summary judgment on the pleadings under Rule 12(c) alleging that the appellant's cause of action was barred by a state statute of limitations. Following argument the District Court filed an opinion on December 10, 1954, sustaining appellee's motion. The docket entries disclose that judgment for the appellee, pursuant to the District Court's opinion, was "Noted and Notice Mailed" on December 13, 1954, making that day the date of judgment and not December 10th as stated by the

6 *Cf.* Fine v. Paramount Pictures, 181 F.2d 300, 303 (7th Cir. 1950). "The trial court did not have jurisdiction to hear and pass on reasons for a new trial which were not assigned and served on the defendants within ten days after the entry of the judgment. . . ." It will be noted that rule 5(a) provides that "every written motion other than one which may be heard ex parte, and every written notice . . . shall be served upon each of the parties affected thereby . . ."

majority. Within ten days, on December 20th or December 21st, counsel for the appellant visited the District Court and made oral request for reargument and submitted in support of that request a "written" memorandum of authorities. The District Court took the request under advisement. On January 3, 1955 it advised appellant's counsel that it would grant reargument and the next day, January 4th, entered a written Order allowing reargument pursuant to a written motion filed at the time.

Proceeding now to the majority's disposition.

Taking first its ruling that the January 4th Order granting reargument on the appellee's motion for summary judgment was a "nullity" under Rule 6(b):

The crux of that ruling is that under the Rules the motion for reargument in the instant case had to be filed within ten days of judgment—accordingly the motion of January 4th was "untimely" because it was filed more than ten days after the judgment of December 13, 1954, and therefore the District Court was "powerless" to entertain it.

I do not agree with the majority's application of the ten-day filing limit to a motion for reargument such as was made here.

As authority for my view I rely on our recent decision, filed December 29, 1955, in Kelly v. Pennsylvania Railroad Company. In that case we stated:

> ". . . we have no doubt of the power of a district court, after denying or dismissing a motion for a new trial, to entertain an application for reargument of the motion and thereupon to reinstate the motion and order it to be reargued. Moreover such action, if taken more than 10 days after the entry of judgment, does not violate the prohibition of Rule 6(b) against extending the time fixed by Rule 59(b) for serving a motion for a new trial. For an application for reargument of a prior motion for a new trial is not to be regarded as itself a mo-

tion for a new trial or even as a renewal of such a motion. It is simply a request that the court reconsider its action upon the original motion. If the reargument is granted the original motion is heard anew upon the original papers just as if it had never previously been heard or determined."[1]

Applying the principles above stated it is clear that the majority erred in dismissing the instant appeal since within 30 days of the judgment of December 13, 1954, the District Court, pursuant to the appellant's written motion of January 4, 1955, on that day entered its Order granting reargument. That Order operated to terminate the running of the time for appeal from December 13, 1954 and instead made the appeal time commence to run from May 16, 1955, when the District Court filed its subsequent Order "denying motion for reargument." Since the notice of appeal was filed on May 16, 1955, immediately following the entry of this second Order, the instant appeal was, of course, timely filed.

In view of the foregoing no extended discussion is necessary of the majority's ruling that the appeal must be dismissed because the appellant failed to present a "written motion" to the District Court on December 20th or 21st, as required by Rule 7(b)(1).

Implicit in the majority's ruling is its view that the District Court could not in the exercise of its discretion treat the "written" memorandum of authorities given to it in support of the oral motion for reargument as a sufficient compliance with the provisions of Rule 7(b)(1).

I think that it is a fair inference that the District Court regarded the appellant's memorandum as a sufficient compliance with the "writing" requirement of Rule 7, and I further believe that it had the discretion to do so and that the discretion was properly exercised.

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1 We made it clear however, in the case cited that any action taken by the District Court had to be within 30 days of the judgment originally entered under the provisions of Rule 73(a).

In this connection it is pertinent to note that the Rules do not specifically deal with the subject of reconsideration of summary judgments under Rule 12(c). That being so there is every reason why appellate courts should refrain from calling into play "unwritten" Rules which would operate to deprive a district court of its inherent discretion to reconsider, when the ends of justice and efficient judicial administration so require, summary judgments of the kind here involved.

For the reasons stated I would deny the motion to dismiss the instant appeal.

FILED
APR 18 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.

No. 789

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

WILLIAM KELLY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTER STATEMENT OF THE CASE.

The Court of Appeals held that where pursuant to petitioner's request the District Court granted reargument of its motion for a new trial, petitioner may not appeal to it while that motion remains undisposed of.

On November 24, 1954, judgment was entered on a jury verdict in favor of the plaintiff (here respondent). On November 29, 1954, petitioner filed motion for judgment and a new trial. On June 6, 1955, after oral argument on the motion for judgment, the District Court *dismissed* the motion for a new trial as abandoned and denied the motion for judgment. On June 8, 1955, petitioner averred that it did not intend to abandon its motion for a new trial and asked for reargument of the same. This was granted on June 16, 1955. Petitioner having received what it requested, nevertheless appealed on June 28, 1955, before the motion for reargument was heard or disposed of.

The Court of Appeals *dismissed* the appeal because the defendant's timely motion for a new trial was reinstated by the granting of the reargument. It held the appeal was premature because the motion for a new trial was still outstanding.

Although petitioner may now have what it sought, viz., reargument of its motion for a new trial and a subsequent appeal to the Court of Appeals if such motion is decided adversely to it, petitioner now seeks certiorari from the far from final order of the Court of Appeals.

ARGUMENT.

A. Summary of Reasons for Denying Certiorari.

1. The decision from which certiorari is sought involves a very limited question which is of little or no importance in the administration of justice.

2. The decision below is not in conflict with any other decisions of other Courts of Appeals.

3. The decision below is correct in holding that where after the denial of a new trial a litigant asks for and obtains a reargument he may not then appeal because his appeal is premature.

4. To allow this appeal prior to disposition of the motion for a new trial will adversely and irreparably prejudice the respondent.

B. Amplification of Reasons for Denying the Writ.

Nothing more is involved in this case than a simple procedural question of whether when a party has asked for and received a reargument of a motion for a new trial the time for taking an appeal runs from the denial of the new trial or from the denial of the motion after reargument (if there is a denial). It seems rather ridiculous that this Court, overburdened with questions of tremendous public importance, should be asked to grant certiorari to consider this trivial question. The decision in this case cannot adversely affect the petitioner. The petitioner here will have ample opportunity to have its case heard both by the trial Judge and the Court of Appeals. Indeed having obtained precisely what it asked for (viz., a reargument), petitioner is now asking this Court to say, in essence, "there shall be no reargument". It may well be asked, "Why?". The only answer is that the petitioner does not want the

trial Judge to hear argument on the motion for a new trial. It seeks to foreclose him from writing an opinion on a motion which it *abandoned* at the time of argument. In printing its record it has deleted pages of vital testimony which go to the heart of the case. Of course, petitioner should not be allowed to do this.

Furthermore, there is absolutely no inconsistency between the decision of the various Circuits. A reading of *Marten v. Hess,* 176 F. 2d 834 (C. A. 6, 1949); *Terrasi v. South Atlantic Lines, Inc.,* 226 F. 2d 823 (C. A. 2, 1955); *Raughley v. Pennsylvania Railroad Company,* — F. 2d — (C. A. 3, 1956), 22 Fed. Rules Serv. 73a.64 case 3, and the instant case reveals this very simple rule. A party against whom a judgment is entered must file a motion within ten days. If such motion is denied the lower Court must grant a reargument of such within thirty days or the time for appeal runs. If such reargument is granted the time for appeal does not expire until thirty days after the denial.

This rule is a simple rule which not only makes for speedy administration but also allows the trial Judge to reconsider a motion when he so desires. Also, since there is no compulsion upon any litigant to file a motion for a reargument, such losing party may appeal from the refusal of a new trial immediately and thus save time in the lower Court if he decides a reargument would be of no avail.

The rule enunciated above is the rationale of all the decided cases from *Marten v. Hess, supra,* to *Raughley v. Pennsylvania Railroad Company, supra.* For the purpose of showing this is the rule we set forth the time table in the cases and the reason for holding the appeal timely, premature or late.

Marten v. Hess, 176 F. 2d 834 (C. A. 6, 1949).
December 1, 1948—Judgment
December 19, 1948—Motion for a new trial
January 11, 1949—Motion denied
Motion for leave to file a motion for a new trial.

Obviously, the first motion for a new trial was not filed within ten days prescribed by the rules. Obviously, the later motion could not thereafter extend or enlarge upon the appeal time.

Terrasi v. South Atlantic Lines, Inc., 226 F. 2d 823 (C. A. 2, 1955).

January 20, 1955—Verdict
January 20, 1955—Oral motion for new trial denied
January 21, 1955—Judgment
January 21, 1955—Motion for reargument of motion for new trial
February 28, 1955—Motion of January 21, 1955 denied
March 2, 1955—Appeal

Obviously, the motions were all timely and the Court held that the time ran from the denial of the last motion.

Kelly v. Pennsylvania Railroad Company, this case.

November 24, 1954—Judgment
November 29, 1954—Motion for a new trial
November 29, 1954—Motion to set aside verdict and judgment and to enter judgment in defendant's favor
June 6, 1955—Order of Court dismissing motion for a new trial and denying motion for judgment n. o. v.
June 8, 1955—Petition of Defendant for Reargument
June 16, 1955—Order granting reargument sur petition for new trial
June 28, 1955—Defendant's notice of appeal

Raughley v. Pennsylvania Railroad Company, supra.

December 10, 1954—Judgment
January 4, 1955—Petition for Reargument filed and allowed
May 16, 1955—Order denying motion for reargument
May 16, 1955—Notice of Appeal filed

No motion filed within ten days and therefore no extension of the time for filing an appeal.

It is interesting to note that both the majority and the dissent in the *Raughley* case, *supra*, discussed at length the effect of an *informal* motion for reargument in chambers on December 20, 1954. The majority decided that such action was insufficient to constitute a motion and therefore insufficient to extend the time for filing the appeal. Thus, they concluded that no motion having been filed within ten days, the appeal time had run.

Actually, in practical application, petitioner's argument must reduce itself to the fact that a trial Judge has no power to grant a reargument except when such is filed within the ten day period.[1] And this is petitioner's argument despite the fact that it asked for and received a reargument.

Nowhere in the procedural rules does it appear that it was the intention of the framers to deprive the judges of the District Courts of the power to grant reargruments.

The power to grant reargruments or rehearings certainly abides in the Courts of Appeals. Consideration of a petition for rehearing extends the time for petitioning to this Court. *Department of Banking v. Pink*, 317 U. S. 264, 266, 63 S. Ct. 233, 234 (1942). Is there any reason to believe that it was intended that there should be one rule with respect to reargruments in the District Courts and their effect upon appeals to the Courts of Appeals and another rule with respect to a rehearing in the Court of Appeals and its effect upon a petition for certiorari or appeal to this Court? We submit that such would not be an orderly method of procedure.

Counsel for petitioner would have this Court believe that *Raughley* and *Kelly* are in conflict. They completely overlook the fact that they each arise from decidedly different proceedings.

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1. Although this occurred in *Terrasi v. South Atlantic Lines, Inc.*, 226 F. 2d 823 (C. A. 2, 1955), it is a situation which is admitted exceedingly rare. Petitioner's brief, Dissenting opinion of Chief Judge Biggs, page 32.

In *Kelly* a timely motion for a new trial was filed. In *Raughley*, the only motion which could be filed was a motion for reargument. This was not filed within ten days.

More fancied than real is petitioner's argument that if the instant decision is allowed to stand a District Court may by granting numerous reargruments extend indefinitely the time for appeal and thus delay actions for long periods of time. Actually, any Judge if he so desires may delay acting on a motion for a new trial indefinitely and by so doing delay the case. We do not think, however, that this Court should impute to any District Court Judge the motive of granting reargruments for the sole purpose of delay.

Rule 1 of the Federal Rules of Civil Procedure provides that the rules should be construed "to secure the just, speedy, and inexpensive determination of every action." This decision does just that. On the other hand a decision to the contrary would:

1. Deprive the trial Judge of the very valuable power to grant reargruments except when they are filed within ten days of the entry of judgment. (A situation which is extremely rare.)

2. Make the practice as to reargruments in the District Courts and their effect on the time for appeals directly the opposite from the long established practice on rehearings and their effect on petitions for certiorari to this Court.

3. Allow a petitioner such as this one to file a petition for reargument, have it granted, and then appeal in an effort to prevent the trial Judge from writing an opinion on the merits of its motion.

4. The order of the trial Judge dismissing the motion for a new trial reads as follows:

> "And Now, to wit, this 6th day of June, A. D. 1955, counsel for the defendant having appeared before us at oral argument, and having filed a brief which is devoted exclusively to its Motion for Judgment n. o. v.,

and having failed completely to discuss the question of a new trial or to cite any cases or authorities in support of the reasons assigned in its Motion for New Trial, we consider the Motion for a New Trial as abandoned and therefore dismiss the same under the authority of Central R. Co. v. Schick, 38 F. 2d 968 (C. C. A. 3, 1930); Harris v. Clinton, 112 A. 2d 885 (Conn. 1955); United States v. Spector, 343 U. S. 169, 72 S. Ct. 591 (1952); O'Neal v. Union Production Co., 153 F. 2d 157 (C. C. A. 5, 1946), cert. den. 67 S. Ct. 46; Kimball Laundry Co. v. United States, 166 F. 2d 856 (C. C. A. 8, 1948); Bumpus v. Remington Arms Co., 183 F. 2d 507 (C. A. 8, 1950).

"The Motion for Judgment n. o. v. is denied."

This was not an off the cuff ruling. This was an intelligent, considered ruling based upon the tactics of the petitioner. There were many objections made to the admission or exclusion of important testimony during the trial. There were exceptions taken to the charge. These went to the heart of the case. Inasmuch as the motion for a new trial was neither briefed nor argued before the Court, the District Court Judge treated the same as abandoned. Else the trial Judge would have found himself in the same position as was the trial Judge in a case involving this same petitioner (*Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954)), where similar tactics were followed which lulled the trial Judge into believing that the motion for a new trial was abandoned and then on appeal to the Court of Appeals a full scale brief and argument was made in that Court. That Court believing that the same had been properly raised below considered the subject matter raised in the briefs. The trial Judge in this case in protection of himself, here consented to an opportunity to hear, pass on, and write an opinion upon whatever questions of law the petitioner really desired to raise. The petitioner in an effort to by-pass the trial Judge took this appeal without

first arguing the motion for a new trial below. In its record in the Court of Appeals, it deleted portions of significant testimony which by operation of law would create a master-servant relationship by estoppel. As the record was printed and presented by the petitioner in the Court of Appeals, that important question of law would not be before the Court.

Assuming pro arguendo only that this question of the right to appeal at this time ought to be decided by this Court, we respectfully submit that this under the facts just set forth is not the proper case in which to decide it.

All of these are the undesirable consequences of the rule which petitioner here seeks to uphold. This would be the result if this Court granted certiorari and reversed. However, we respectfully submit that the issue here involved is so narrow, insignificant and trivial that certiorari should not be granted.

C. Conclusion.

The decision of the Court of Appeals on the issue involved has little or no effect on the administration of justice. It is not the type of question which this Court should consider. It is not a final disposition of the case. It is correct and in no way conflicts with any other decision by the Third Circuit or any other Circuit. This is not the case to decide the question in at any rate. It should not be reviewed by certiorari.

Respectfully submitted,

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